FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 20 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 824

WASSILI A. KRESHIK, as Dean of Saint Nicholas Cathedral, and BORIS VIK, as Archbishop, etc., *et al.*,
Petitioners,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

PHILIP ADLER,
Attorney for Petitioners,
8 West 40th Street,
New York 18, N. Y.

PHILIP ADLER,
EUGENE GRESSMAN,
of Counsel.

INDEX

Table of Cases

	PAGE
Abie State Bank v. Bryan, 282 U. S. 765	4
Angelos v. Mesevich, 289 N. Y. 498	2
Ex parte Texas, 315 U. S. 8	5
Indiana v. Brand, 303 U. S. 95	5
Marsh v. Alabama, 326 U. S. 501	4
Staub v. Baxley, 355 U. S. 313	4

IN THE

Supreme Court of the United States

October Term, 1959

No. 824

WASSIL A. KRESHIK, as Dean of Saint Nicholas Cathedral, and BORIS VIK, etc., *et al.*,

Petitioners,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

(Unidentified numbers in parentheses refer to pages of the printed record used in the State Court. Page references to the record used in this Court on the first appeal are preceded by the letters U.S.)

1. Respondent makes no attempt to defend the constitutional validity of the majority's "domination", "trustee" and "discretion" theories—the so-called "common law" basis of their decision.

2. Respondent makes no attempt to answer the contention of the three dissenting judges that the majority decision contravenes Justice Reed's opinion, *Watson v. Jones* and the First Amendment; that this Court has already "forbidden * * * interference by the New York courts with the appointment of this archbishop to this diocese of this cathedral by this Patriarch of Moscow" (p. 26a of petition); that the Court of Appeals had no

jurisdiction to "disregard" affirmed findings of fact (p. 27a of petition)* and petitioners' contention that in selecting this particular case for such extra-judicial action, the majority denied them the equal protection of the laws.

3. Respondent makes no attempt to deny that under canon law the bishop appointed by the Patriarch has the exclusive right to use and occupy the cathedral and that such appointment and such use is an exercise of religion which is protected by the First Amendment from curtailment by the civil power.

4. Respondent's answer to the petition consists merely of (A) an attack on the Patriarchate and a distorted version of some events in the post-revolutionary history of the Church ** and (B) a claim that the judgment rests on "adequate state grounds"—without disclosing what these grounds are.

5. (A) The attacks on the Patriarchate by respondent's counsel—the record discloses no such strictures by any bishop of the metropolitan district—come to nothing in the face of the paramount fact (which respondent does not mention) that the metropolitan district requested the Patriarch to "continue us in his fold and be our Spiritual Head" on terms of autonomy, that the Patriarch offered the district autonomy on purely canonical terms which were to conform to our laws, and that the local churches

* This lack of power is explicitly set forth in *Angelos* v. *Mescrich*, 289 N. Y. 498, 500.

** Thus, by way of example, respondent stresses the Soviet legislation of 1929, but fails to state that its expert, Dr. Gsvoski admitted that the statutes (the constitution) of the Patriarchate adopted in 1945 "imply recognition of the Church hierarchy by the Soviet government and grant powers to the church conflicting with the previously restrictive laws (478), which, Professor Timasheff said had been repealed (481, 483). The excerpt on page 35 of its brief about Marx, etc., is not a statement by anyone connected with the Patriarchate.

adhering to the Patriarch affirmed their complete loyalty to this country (1463, 740, 809).* And Dr. Spinka agreed with Dr. Anderson's statement (*People, Church and State in Modern Russia*) that the Patriarchal Church "desires to be and feels itself to be the Church of the Russian *people*, not the Church of the Soviet *state*" (308, italics added).

B. The judgment does not purport to and cannot possibly rest on any *state* ground, let alone an *adequate* one to the exclusion of the federal questions. In this respect respondent's sole claim rests on its *title* to the physical premises. Although we believe that this claim is untenable on its face, we nevertheless observe:

(a) Respondent's title is nominal, merely and does not carry with it the right of *use* which is fixed by canon law in the appointed bishop. Thus the very first sentence of Justice Reed's opinion says that the "right to the use and occupancy of a church [Saint Nicholas] in the City of New York is in dispute" (344 U. S. 95). And again, after noting that title is in respondent, the Justice again says "The issue is the right of use" (*id.* at 96; footnote 1). And then Justice Reed added: "Determination of the right to use and occupy Saint Nicholas depends upon whether the appointment of Benjamin [the predecessor in office of petitioner Bishop Boris] by the Patriarch or the election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarch of the American churches" (*id.* at 97). And then the Justice held that the appointment of the Patriarch and not the local election "validly selects" the bishop of the diocese, that such patriarchal appointee has the right to use and occupy the cathedral, that such appointment of the bishop and such use by him of the cathedral is an exercise of religion which is protected by the First Amendment and *Watson* v. *Jones*

* Father Dzvonchik testified that Patriarchal pronouncements are binding on the clergy "only in matters of doctrine, dogma or ritual" and "nothing else" (924).

from curtailment by state action; and this necessarily includes judicial action on the basis of alleged common law.

(b) Justice Frankfurter concurring said:

> "In any event, this proceeding rests on a claim which cannot be determined without intervention of the state in a religious conflict. Saint Nicholas Cathedral is not just a piece of real estate. It is no more that than is Saint Patrick's Cathedral or the Cathedral of Saint John the Divine. A Cathedral is the seat and center of ecclesiastical authority. Saint Nicholas Cathedral is an archiepiscopal see of one of the great religious organizations. What is at stake here is the power to exercise religious authority. That is the essence of this controversy'" (*id.* at 121).

(c) Title to the physical premises was originally taken in the name of a domestic religious corporation of which the Russian ambassador and consul general were the sole trustees. Obviously this corporation had no power to eject the bishop. In 1916 it transferred the title to bishop Evdokim who in 1917 returned the title to the corporation which in 1925 gave it to petitioner (U.S. p. 229-3, 73, 204-6). This shifting about of this rather peripatetic title had no effect on the canonical status of the cathedral which was reserved by canon law for the use of the appointed bishop. Just as the ambassador's corporation could not have ousted Evdokim so may not its grantee oust his duly appointed successor in office.

(d) Even where a state court decision might rest on a state ground, this Court will take jurisdiction where it is "entangled" or "interwoven" with a federal right (*Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Marsh* v. *Alabama*, 326 U. S. 501, 505, 510) or where the federal right is violated in "substance and effect" (*Staub* v. *City of Baxley*, 355 U. S. 313, 319).

Indeed, it is inconceivable that the decision below could possibly rest, to the exclusion of the constitutional issue,

on a state ground let alone an *adequate* one. Not only did the three dissenting judges contend that it violated Justice Reed's opinion, *Watson* v. *Jones* and the First Amendment, but the majority expressly ruled adversely to petitioners on these precise issues. Their ruling that the ouster of the Patriarchal bishop, despite the canon law, does not violate the First Amendment, that *Watson* v. *Jones* does not apply and that their decision does not contravene Justice Reed's opinion, obviously raises federal questions expressly, directly and specifically (*Indiana* v. *Brand*, 303 U. S. 95, 98). And in *Ex parte Texas* (315 U. S. 8), this Court, in post-mandate proceedings in a case emanating from a state court, said that "the proper construction of a mandate of this Court" is "an indubitably federal question" (p. 13).

Conclusion

If the sheriff armed with a judgment of a civil court were to enter the cathedral and in Caesar's name were to cast out the patriarchal bishop rightfully there by canonical law, he would prohibit the free exercise of religion in contravention of the First Amendment and since that Amendment binds every agency of government, including the courts, it matters not at all whether that judgment is based on a statute or on some fancied rule of common law.

The petition and the relief which it seeks should be granted.

Respectfully submitted,

PHILIP ADLER,
Attorney for Petitioners.

PHILIP ADLER,
EUGENE GRESSMAN,
of Counsel.